



DATE: JAN 9 1989
CASE NO. 88-INA-46

IN THE MATTER OF:

ALLIED TOWING SERVICE
Employer

on behalf of

CIRILO MAXIMILIANO BRAGANZA
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill,
Schoenfeld, and Tureck, Administrative Law Judges

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. § 656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

Allied Towing Service, Employer, is a marine towing company located in Harvey, Louisiana. On January 3, 1986 the Employer filed an application for labor certification on behalf of the Alien, Cirilo Maximiliano Braganza, to fill the position of General Manager-International Operations. The duties of the position include managerial and administrative responsibilities for the company's overseas contracts. Employer described the minimum requirements as a high school diploma and familiarity with maritime towing contracts, maritime insurance, and business methods used in the Middle East and in the Indian Ocean area. (AF 252).

The Certifying Officer issued his Notice of Findings ("NOF") on September 25, 1986 (AF 108), and Employer submitted its rebuttal on November 3, 1986. (AF 68). A second Notice of Findings was issued on May 8, 1987 (AF 66), to which Employer submitted its rebuttal on June 9, 1987. (AF 60).

On September 11, 1987 the Certifying Officer issued his Final Determination denying Labor Certification. First, the Certifying Officer found Employer to be in violation of 20 C.F.R. 656.21(g)(8), which provides that an employer must offer to U.S. workers wages, terms, and conditions of employment that are no less favorable than those offered to the alien. Employer had used a questionnaire to determine the qualifications of some of the U.S. applicants, which had not been used in hiring the Alien. Secondly, the Certifying Officer found Employer to be in violation of 20 C.F.R. 656.21(b)(7), which provides that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful, job-related reasons. The Certifying Officer found that there were fifteen qualified, willing and available U.S. workers at the time of application who were rejected for non-job-related reasons. Finally, the Certifying Officer stated that the job is not open to U.S. workers. (AF 57).

Employer timely filed a request for review (AF 6-8) and a brief in support of that request. These have been duly considered.

Discussion

The primary issue in this case is whether Employer lawfully may require a U.S. worker to submit to a questionnaire designed to measure his qualifications, while not offering the same questionnaire to the Alien due to Employer's familiarity with the Alien's qualifications. Based upon the following, we find that Employer may do so.

The Certifying Officer apparently characterized the filling out of the questionnaire as a term or condition of employment. The Certifying Officer is mistaken in this characterization. The Application For Alien Employment Certification (AF 252) and the recruitment advertisements (e.g., AF 23) were explicit in requiring knowledge of the maritime towing business and of business methods used in the Middle East and in the Indian Ocean. It is this knowledge that is the true condition of employment for the position, not the filling out of the questionnaire. As Employer pointed out in its brief (Employer's Brief at 4), the questionnaire simply asks, in written form, the same questions that would inevitably be asked at any typical interview in order to determine a worker's qualifications.

Furthermore, in response to the Notice of Findings of May 8, 1987, Employer submitted an affidavit signed by the President of the company, Gary Sercovich. In that affidavit, Mr. Sercovich stated that the Alien had worked several years for his, Mr. Sercovich's, brother who was engaged in marine towing and shipbuilding; that the Alien was recommended to him by his brother; and that he interviewed the Alien, found him to be satisfactory, and offered him a position in the company. (AF 16). From April 1983 to May 1984 the Alien worked for Employer at its office located in Dubai, UAE. From June 1984 until the present he has been working in Employer's Louisiana office in the position for which certification is being sought. (AF 253). In addition, Mr. Sercovich stated that he had observed the Alien's performance in a wide variety of tasks, was convinced that the Alien already had the qualifications for the position, and therefore felt it unnecessary to have the Alien complete the questionnaire. (AF 16-17).

We agree with Employer that it was unnecessary to require the Alien to complete the questionnaire. To require the Alien to complete the questionnaire at that time would have been a useless act. Accordingly, we reverse the Certifying Officer's determination that Employer failed to offer the same terms and conditions of employment to U.S. workers as were offered to the Alien.

The Certifying Officer, in the first NOF, identified fifteen U.S. applicants whom he stated, without elaboration, were qualified because they had "education/experience" greater than that of the Alien. In its rebuttal to this NOF Employer provided the rationale it relied upon for its rejection of each U.S. worker identified by the Certifying Officer. The Certifying Officer did not include this group in his second NOF.

The Certifying Officer then concluded in his Final Determination that there were fifteen qualified, willing, and available U.S. workers who were rejected for other than job-related reasons, and that Employer's job is not open to U.S. workers. (AF 57). We agree with Employer that these bald conclusions are without any supporting rationale. For this reason, we conclude that Employer has demonstrated that there were no qualified, willing and available U.S. workers. Thus, the Final Determination must be reversed and Employer's application granted.

ORDER

Accordingly, the Certifying Officer's determination is hereby REVERSED and certification is hereby GRANTED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

Washington, D.C.

MS/tjp